

DOCKET FILE COPY ORIGINAL

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.

SUITE 1000 WEST

WASHINGTON, D.C. 20005-3317

(202) 326-7900

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

May 22, 1997

RECEIVED

MAY 22 1997

Federal Communications Commission
Office of Secretary

FACSIMILE

(202) 326-7999

VIA HAND DELIVERY

William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554



Re: In the Matter of Toll Free Service Access Codes
CC Docket No. 95-155

Dear Mr. Caton:

Enclosed for filing please find an original and ten copies of the Joint Comments of the Bell Operating Companies and Bellcore in reference to the above-captioned matter.

Please date-stamp the extra copy of the Joint Comments and return it to the individual filing this material. Thank you for your assistance with this matter.

Yours sincerely,

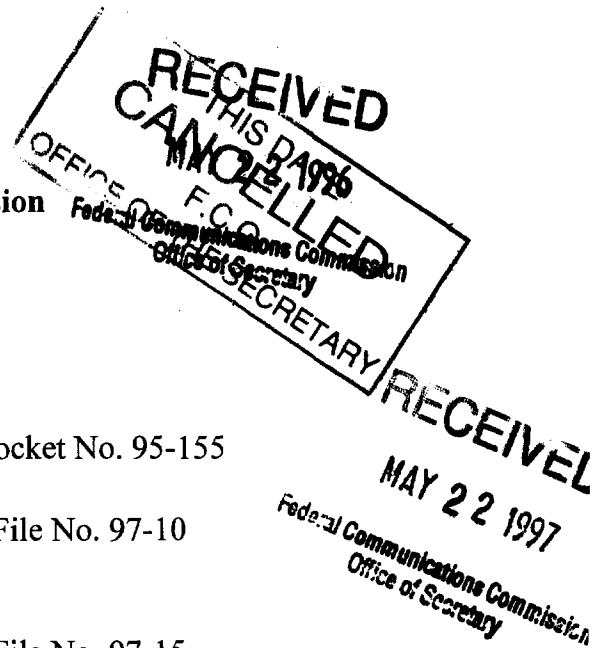
Michael K. Kellogg

Enclosures

No. of Copies rec'd
List ABOVE

029

Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)	
)	
Toll Free Service Access Codes)	CC Docket No. 95-155
)	
Petition to Modify 888 Number Allocation Plan filed by LCI International, Inc.)	NSD File No. 97-10
)	
Petition to Modify 888 Number Allocation Plan filed by UniDial, Inc.)	NSD File No. 97-15
)	
Petition to Modify 888 Number Allocation Plan filed by Consolidated Communication Telecom Services Inc.)	NSD File No. 97-16
)	

**JOINT COMMENTS OF THE BELL
OPERATING COMPANIES AND BELLCORE**

ORIGINAL

Michael K. Kellogg
Kevin J. Cameron
KELLOGG, HUBER, HANSEN, TODD
& EVANS
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for Bellcore and the Bell
Operating Companies

May 22, 1997

EXECUTIVE SUMMARY

In the last decade, the demand for toll free numbers has exploded: More than 10 million toll free numbers are now in use, and consumers place more than 100 million toll free calls every day. The national SMS/800 system has played a key role in this growth by providing toll free service providers with a reliable way to reserve new toll free numbers and disseminate relevant routing information to local telephone companies.

While acknowledging the soundness of the current system, the Commission has suggested that section 251(e) of the Telecommunications Act of 1996 may require a change - - that an "impartial" entity unaffiliated with any segment of the telecommunications industry be put in charge of administering toll free numbers. More particularly, the Commission has tentatively concluded that one of the participants in the SMS/800 system may have to be discharged for lack of impartiality.

The Commission's conclusion, however, appears to be based on a misunderstanding of the functioning of the toll free number system and, in particular, the work of Database Services Management, Inc. ("DSMI"), a subsidiary of Bellcore. The Bell companies currently provide access to the SMS/800 system under tariff. They, in turn, have subcontracted the actual task of providing and maintaining the database to four subcontractors. But DSMI and the other subcontractors -- including Southwestern Bell Telephone, which provides the hardware for the SMS/800 database, and Bellcore, which provides the software -- simply maintain the centralized database in which records of the toll

free numbers are kept. They have no control over or even a role in the actual allocation of toll free numbers.

Since access to the SMS/800 system is provided under nondiscriminatory tariff, toll free service providers are able to obtain equal access to the database and reserve toll free numbers without fear of discrimination. Indeed, as the Common Carrier Bureau has already concluded, there is absolutely no evidence that the Bell companies, or any of their subcontractors, have lacked impartiality in providing access to the SMS/800 system.

In addition, mandating the replacement of DSMI would require a time-consuming selection and transition process, which could take many months. By that time, the pending sale of Bellcore (and DSMI) to Science Applications International Corporation ("SAIC") -- an entity unaffiliated with any industry segment -- will be final, thus mooted any statutory concerns.

The Commission thus should recognize that section 251(e) does not require the replacement of DSMI or the other database subcontractors. The Commission should also decline to modify, in any other ways, existing regulation of SMS/800 functions. The existing system has served all carriers efficiently and in a non-discriminatory fashion.

Finally, the Commission should reject any suggestion that it impose a mandatory licensing requirement for the SMS/800 system software that the Bell companies, through Bellcore, have expended tens of millions of dollars in developing. There is no policy or statutory basis for such a requirement, which would in any event constitute an unlawful taking of private property.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Toll Free Service Access Codes)	CC Docket No. 95-155
)	
Petition to Modify 888 Number Allocation Plan filed by LCI International, Inc.)	NSD File No. 97-10
)	
Petition to Modify 888 Number Allocation Plan filed by UniDial, Inc.)	NSD File No. 97-15
)	
Petition to Modify 888 Number Allocation Plan filed by Consolidated Communication Telecom Services Inc.)	NSD File No. 97-16
)	

**JOINT COMMENTS OF THE BELL
OPERATING COMPANIES AND BELLCORE**

BACKGROUND

Consumer demand for toll free numbers has grown dramatically in recent years, and the industry's ability to meet this unexpected demand has been due, in great part, to the unique and open way in which toll free numbers are allocated.

A customer wanting a toll free number contacts one of more than 180 "Responsible Organizations" or "Resp Orgs" permitted to provide those numbers. Any entity meeting certain specified criteria can qualify as a Resp Org. For example, a Resp Org can be an interexchange carrier, a local telephone company, a wireless carrier, a large organization, or even an individual.

When contacted by the customer, the Resp Org accesses the national toll free database, known as the SMS/800 database, and reserves a toll free number from among the pool of available numbers. (A Resp Org also can access the database and reserve blocks of numbers for the anticipated use of specific subscribers.) After reserving the toll free number, the Resp Org downloads the new subscriber's record into the SMS/800 database, either electronically (through dedicated or dial-up access) or by sending tapes to the database system administrators. The SMS/800 system can then update regional toll free database tables with the new records.

The Bell companies currently provide the Resp Orgs with access to the SMS/800 system under tariff. The Bell companies have, however, subcontracted the actual task of providing and maintaining the database to four subcontractors.

After a competitive bidding process run by a neutral consultant, the Bell companies contracted with Southwestern Bell to provide hardware support for the SMS/800 system and an identical back-up system. Southwestern Bell also provides security and technical trouble-shooting for the system, ensuring, for example, that the links to and from the database are in place and that valid Resp Orgs are able to access the database.

Day-to-day support for Resp Orgs using the SMS/800 system is provided under contract by the 800 Number Administration and Service Center ("NASC"). Pursuant to the Commission's order in Docket 86-10, these tasks have been subcontracted out to a

neutral third party. Order, Provision of Access for 800 Service, 8 FCC Rcd 1423, 1427 (1993) ("800 Service Order"). The current provider of these services is Lockheed Martin IMS. The NASC acts as a central point of contact for trouble reports, gives new Resp Orgs access to the system, and provides a hot line/help desk for Resp Org questions relating to use of the SMS/800 system. If a Resp Org has problems accessing the database or modifying an entry contained therein, for instance, it uses the hotline to contact the NASC.

Bellcore provides software support and maintenance to the SMS/800 system software under contract, as well as billing and collection services for SMS/800 functions. Database Services Management, Inc. ("DSMI"), a Bellcore subsidiary, provides general oversight of the SMS/800 system and works to ensure that access to the SMS/800 system is provided in accordance with the terms of the SMS/800 functions tariff.

I. SECTION 251(e) DOES NOT REQUIRE THAT DSMI OR ANY OTHER DATABASE SUBCONTRACTORS BE DISPLACED

Access to the SMS/800 system is provided pursuant to a nondiscriminatory tariff that allows Resp Orgs to reserve toll free numbers on a first-come, first-served basis. This ensures that toll free numbers are allocated in a nondiscriminatory and equitable way, as section 251(e) requires. Notwithstanding the Commission's tentative conclusion to the contrary, see Second Report and Order and Further Notice of Proposed Rulemaking, Toll Free Service Access Codes, CC Docket No. 95-155, at 62-63 ¶ 101

(Apr. 11, 1997) ("FNPRM"), DSMI simply manages the toll free system, a complex but largely ministerial task that does not involve allocating toll free numbers. Thus, no change in the current provision of the SMS/800 system is required.

A. SMS/800 ACCESS IS CURRENTLY PROVIDED PURSUANT TO A NONDISCRIMINATORY, IMPARTIAL TARIFF

In its prior 800 service docket, the Commission concluded that access to the SMS/800 system is a Title II common carrier service that must be provided under tariff. Noting that the Bell companies jointly provide SMS/800 database functions, the Commission required the Bell companies to file a single joint tariff for access to the SMS/800 functions. 800 Service Order at 1427, ¶¶ 20-21.

The SMS/800 functions tariff contains the prices, terms, and conditions of access to the SMS/800 system, as well as eligibility requirements for Resp Orgs and a list of Resp Org responsibilities. Like any other tariffed service, the Commission requires that SMS/800 functions be provided on a nondiscriminatory basis. Id. at 1426, ¶¶ 28-29.

And access to SMS/800 functions has in fact been provided on a nondiscriminatory basis. As the Chief of the Common Carrier Bureau has recognized, no party has ever "alleged specific acts of discrimination by the BOCs or Bellcore in connection with the 800 database." Letter from Kathleen Wallman, Chief, Common Carrier Bureau, to James S. Blaszak, Gardner Carton & Douglas, et al. at 2 (June 21, 1995) ("Wallman Letter"). Nor have any of the commenters in this proceeding (Docket

95-155) alleged that there has been any lack of impartiality in the administration of SMS/800 access.

The tariffing requirement ensures that toll free numbers are administered in an impartial way: The Bell companies provide the Resp Orgs with access to the SMS/800 database on nondiscriminatory terms and conditions, and the individual Resp Orgs select toll free numbers on a first-come, first-served basis. Since the Resp Orgs obtain nondiscriminatory, direct electronic access to the national database, they are able to reserve numbers themselves without the intervention of any other entity and without fear of favoritism. Section 251(e)'s requirements are thus satisfied.

**B. NEITHER DSMI NOR THE OTHER DATABASE
SUBCONTRACTORS ARE ENGAGED IN NUMBER
ADMINISTRATION**

The Bell companies are responsible for implementing the policies and procedures associated with SMS/800 database access, including tariffing, subcontractor selection and billing and collection. As already noted, the Bell companies have contracted with DSMI to provide general oversight for the SMS/800 system, with Southwestern Bell to provide hardware support for that system, and Bellcore to provide software support. None of these subcontractors has any hand in reserving, allocating, or disseminating specific toll free numbers from the SMS/800 database. That task is undertaken by the Resp Orgs themselves, since by selecting a number from the pool of unreserved numbers, the Resp Org is able automatically to reserve a number for its customer.

In reality, therefore, specific toll free numbers are directly reserved in the SMS/800 database by the individual Resp Orgs. DSMI and the other subcontractors play no active part in this selection process. These entities simply maintain the SMS/800 system. They keep track of which numbers have been reserved and which ones are available, but they have no ability to dispense toll free numbers, and thus cannot favor any one Resp Org over another.¹

There is no statutory bar to permitting DSMI and the other subcontractors to continue in their existing roles. Nor, certainly, is there any policy reason to exclude them. To the contrary, Resp Orgs filing comments in this proceeding have gone out of their way to praise DSMI and request that it continue in its current role. See, e.g., Comments of Scherers Communications Group at 19 (FCC Oct. 31, 1995) ("As a recent Resp Org, [Scherers] feels that DSMI has been responsive to its customers' needs.").

C. THE PENDING SALE OF BELLCORE/DSMI WILL IN ANY EVENT RENDER THE ISSUE OF DSMI'S ROLE MOOT

Even if DSMI or Bellcore were thought to perform some de minimis aspects of toll free number administration,² Bellcore (including DSMI) has entered into an agreement to be purchased by SAIC, an entity unaffiliated with any segment of the telecommunications

¹The roles played by DSMI, Bellcore and Southwestern Bell are further attenuated by Lockheed, the neutral third-party administrator that provides the day-to-day support for Resp Orgs using the SMS/800 system.

²Certainly Southwestern Bell, which only provides hardware support, could by no stretch of the statutory language be said to provide numbering administration.

industry. As the Commission has already recognized, once this sale is final, DSMI will no longer be an affiliate of "a discrete industry segment." FNPRM at 62-63, ¶ 101. The Commission should not overlook this fact in formulating its order, since the sale will resolve most of the concerns cited in ¶¶ 101-106 of the FNPRM.

The pending sale is expected to be final well before the Commission could even select a vendor to replace DSMI. Moreover, it could easily take upwards of two years fully to replace DSMI and the other subcontractors: Issuing a request for proposal, obtaining and evaluating bids, selecting a new vendor, and, most importantly, having the new vendor deploy and bring up to speed its systems and take over DSMI's responsibilities would all take considerable time. A rushed transition could result in significant service disruptions. There would also be considerable wind-down costs associated with any transition. By contrast, if the Commission simply stays its hand, Bellcore will be sold and both Bellcore and DSMI will shed their ties to the Bell companies. The sale, expected to be finalized in the fall of 1997, will give DSMI "impartial entity" status. Therefore, rather than hastily discharging DSMI to achieve impartiality, the Commission can achieve the same results by awaiting the consummation of the sale. For this reason, Bellcore and the Bell companies urge the Commission to postpone any decision relating to the SMS/800 system until the sale is finalized.

II. THE COMMISSION SHOULD NOT MODIFY EXISTING REGULATION OF THE SMS/800 SYSTEM

There are strong regulatory safeguards in place to ensure that no discrimination is possible with respect to the SMS/800 system. For instance, since SMS/800 access is a tariffed common carrier service subject to FCC jurisdiction, the Commission ensures that the charges for such access are just and reasonable. The Commission has also stated that it will actively investigate any allegations of discrimination by Bellcore or the Bell companies in connection with the operations of the SMS/800 system. For instance, at the behest of a disappointed bidder, the Common Carrier Bureau reviewed the procurement of a hardware vendor for the SMS/800 system. After a careful investigation, the Bureau concluded there was no evidence of discrimination in the selection of the vendor.

Wallman Letter at 2. The Bureau also noted that no party had even raised allegations of specific acts of discrimination in the actual provision of SMS/800 access. Nonetheless, the Bureau cautioned that it “will continue to monitor the administration of the 800 database system, and will consider any specific allegations in the future of anticompetitive conduct by Bellcore, Southwestern Bell, or the other BOCs in connection with the 800 database.” Id. at 3.

Given the safeguards currently in place and the lack of any history of problems, the Commission should refrain from adopting the onerous and unnecessary requirements proposed by the Americas Carrier Telecommunications Association (“ACTA”) and

Sprint. ACTA has proposed, for instance, that any services DSMI subcontracts be subcontracted to an entity that is “neutral and apart from” the telecommunications industry. See FNPRM at 64, ¶ 106. In the first instance, ACTA has simply misunderstood the functioning of the SMS/800 system: It is the Bell companies, not DSMI, who subcontract for SMS/800 functions. Moreover, as discussed above, the Bureau has already concluded that the Bell companies have not discriminated in their procurement practices. ACTA's proposal would impose a significant cost penalty on users of the system, by banning some of the most knowledgeable and cost-efficient suppliers from bidding on SMS/800 contracts. There is no reading of section 251(e) that would support such a blatantly inefficient requirement, and ACTA has not attempted to furnish one. ACTA has failed to cite a single example of discriminatory procurement practices that would warrant its proposed requirement. Nor could it, for no such instances exist.

Sprint has suggested that DSMI should be required to withhold access to, and treat as proprietary, competitively sensitive information. Sprint Comments at 23 (FCC Nov. 11, 1995). Sprint, however, has simply failed to understand how the SMS/800 system actually functions. Rep Orgs generally do not put competitively sensitive information in the SMS/800 database, and to the extent any Resp Org does load any proprietary information, that information already is treated as confidential. Only the associated Resp Org and Lockheed -- the neutral third-party administrator that currently maintains the

NASC help desk -- can access that information. Sprint's proposal is thus unwarranted: There is little sense in requiring DSMI to keep confidential information that it cannot obtain in the first place.

Finally, the Commission should not modify the existing cost recovery method. Currently, the costs of the SMS/800 system are recovered through the cost-based SMS/800 functions tariff and by charges to the regional database providers. There has been no suggestion that this system has benefitted any one group or placed any company at a competitive advantage, and Bellcore and the Bell companies urge the Commission to leave the method of allocating costs unchanged. This system properly places costs on the industry based on their respective use of the SMS/800 system, and thus provides industry members with proper economic incentives in the use of that system. Cf. Administration of the North American Numbering Plan, 11 FCC Rcd 2588, 2629 ¶ 99 (1995) (telecommunications provider should pay a fee based on its direct or indirect use of resources).

III. THE COMMISSION HAS NO AUTHORITY TO IMPOSE A MANDATORY LICENSING REQUIREMENT

Since this Commission mandated 800 number portability in 1991, the Bell companies, through Bellcore, have devoted tens of millions of dollars to the development of the SMS/800 system software. In addition, the Bell companies jointly have committed to multi-year, multi-million dollar contracts for database hardware and Resp Org user

support. Yet now, out of the blue, the Commission has suggested that it may require Bellcore and the Bell companies to license the SMS/800 software to a new toll free administrator. FNPRM at 64, ¶ 105. That suggestion is unfair and inconsistent with the Telecommunications Act.

The FNPRM cites no statutory support for a mandatory licensing requirement. Nor could it, since section 251(e) merely requires that the Commission “create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.” 47 U.S.C. § 251(e). No mention is made of forced licensing of the incumbent provider’s database or switch software.

Mandatory licensing of the SMS/800 system software would, in any event, raise serious constitutional concerns. By divesting the Bell companies of exclusive control of their proprietary database software, the Commission would be taking “one of the most treasured strands in [their] bundle of property rights” and confiscating private property within the meaning of the Fifth Amendment. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). See also United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (protected property interests include “every sort of interest the citizen may possess”); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001-03 (1984) (trade secret rights in certain health and safety data submitted to the EPA were property for purposes of the takings clause). Mandatory licensing would effectively condemn a portion of the Bell companies’ rights in their proprietary software.

The Supreme Court has long held that statutes shall not be construed to delegate the congressional power to take property unless they do so “in express terms or by necessary implication.” Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540, 569 (1904). The Commission recently received a sharp and forceful reminder of this principle from the D.C. Circuit. Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1447 (D.C. Cir. 1994) (holding that since “the [Communications Act of 1934] does not expressly authorize an order of physical co-location, . . . the Commission may not impose it.”).

Congress plainly knows how to write a provision sufficiently explicit to authorize a taking. See, e.g., 47 U.S.C. § 706(d) (expressly authorizing the President, in time of war, to “authorize the use or control” of communications network facilities “upon just compensation to the owners”). It did not do so here. Congress gave the FCC no authority whatsoever in the 1996 Act to require the mandatory licensing of SMS/800 database software.

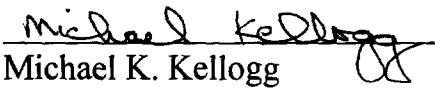
Since neither section 251(e) nor any other section of the Communications Act empowers the Commission to require mandatory licensing, it must refrain from so doing.

Conclusion

The Commission thus should recognize that section 251(e) does not require the replacement of DSMI or the other database subcontractors. The Commission should also decline to modify, in any other ways, existing regulation of SMS/800 access. Finally, the

Commission should reject any suggestion that it adopt a mandatory licensing requirement for the SMS/800 system software.

Respectfully submitted,


Michael K. Kellogg
Kevin J. Cameron
KELLOGG, HUBER, HANSEN, TODD
& EVANS
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for the Bell Operating
Companies and Bellcore

May 22, 1997